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No. 3

In the Supreme Court o

October Ter

The United States of Am
State Commerce Comm

v.

Frank O. Lowden, James E
B. Fleming, as Tr

*APPEAL FROM THE DISTRICT COU
FOR THE NORTHERN DISTRIC
DIVISION*

**BRIEF FOR THE UNITED STATE
COMMERCE CO**

Office - Supreme Court, U. S.
FILED
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of the United States

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ISSION, APPELLANTS

C. GORMAN, AND JOSEPH
RUSTEES, ETC.

RT OF THE UNITED STATES
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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 343

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES, ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 37) has not been reported. The two reports of the Interstate Commerce Commission (R. 8, 18) are reported in 230 I. C. C. 181 and 233 I. C. C. 21.

JURISDICTION

The final decree of the District Court was entered July 21, 1939 (R. 43). Petition for appeal was

filed August 28, 1939, and was allowed the same day (R. 44, 47). Jurisdiction is conferred on this Court by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 219, 220 (U. S. C., Title 28, Secs. 45 and 47 (a), Supp. III), and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (U. S. C., Title 28, Sec. 345). Probable jurisdiction was noted by this Court on October 16, 1939.

QUESTIONS PRESENTED

I

Whether the power conferred upon the Interstate Commerce Commission by Section 5 (4) (b) of the Interstate Commerce Act to authorize the lease of one railroad by another "subject to such terms and conditions and such modifications as it [the Commission] shall find to be just and reasonable," includes the power to prescribe conditions providing that employees who are discharged or transferred as the result of a lease should receive partial compensation for their loss.

II

Whether, if the first question be answered in the negative, the District Court had power to annul and enjoin the conditions prescribed by the Commission and leave outstanding an order authorizing the lease without the conditions.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act (c. 91, 48 Stat. 217, U. S. C., Title 49, Sec. 5 (4)), are as follows:

> (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b), for two or more carriers to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock.
>
> (b) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under subdivision (a), the carrier or carriers or corporation seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any

part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, of the time and place for a public hearing. If after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable.

STATEMENT

This is a direct appeal by the United States and the Interstate Commerce Commission from a final decree of the United States District Court for the Northern District of Illinois, entered July 21, 1939, annulling and setting aside conditions attached to an order of the Interstate Commerce Commission entered April 3, 1939, under Section 5 (4) of the Interstate Commerce Act (R. 43). The Commission's order authorized the appellees to lease the properties of the Chicago, Rock Island & Gulf Railway Company until the termination of pending reor-

ganization proceedings under Section 77 of the Bankruptcy Act, subject, however, to four conditions. These conditions, which are set forth in full in the margin,[1] require appellees, if they elect

[1] "1. No employee of the trustees of The Chicago, Rock Island and Pacific Railway Company and the trustees of The Chicago, Rock Island and Gulf Railway Company, hereinafter designated as the carriers, who is continued in service shall, for a period of five years from the commencement of operation under the said lease but not beyond the date of termination, as to either carrier, of the reorganization proceedings under section 77 of the Bankruptcy Act, be placed, as a result of operation under said lease, in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of commencement of operation under said lease, so long as he is unable in the exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at the date of commencement of such operation; that so long as he is unable to obtain a position with said trustees yielding compensation equal to or exceeding his compensation at the time of the commencement of said operation, he shall be entitled to a monthly allowance equal to the difference between the monthly compensation of the position in which he is retained and the compensation of the position in which he was displaced, the latter monthly compensation to be considered one-twelfth of the total compensation received by him in the twelve months prior to his displacement, less compensation at the rate of compensation of his retained position for any time lost on account of his voluntary absences, provided, however, that the employee's compensation which it is the purpose of this condition to guarantee shall in no case exceed that which he received in the 12 months prior to his displacement, reduced by any change in wage scales or revision of rules detrimental to the employee, which change or revision is made to affect railroad employees generally; and provided further, that

to consummate the lease, to refrain for a period of five years from making any reduction in the salary of retained employees whose seniority rights might be affected by the lease, to pay an allowance

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nothing herein shall operate to affect in any respect the retirement on pension or annuity rights and privileges in respect of any of the employees; and provided further, that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance.

2. Any employee of the carriers who is deprived of employment with said carriers, hereinafter designated as a dismissed employee, because of the abolishment of his position or the loss thereof as a result of the exercise of seniority rights by an employee whose position is abolished as a result of operation under said lease, shall be accorded a monthly allowance, designated dismissal allowance, based on length of service (except in the case of an employee with less than one year of service) equivalent to 60 percent of the average monthly compensation of said dismissed employee during the last twelve months of his employment in which he earned compensation prior to the date he is first deprived of employment; that this allowance be made to each eligible employee while unemployed during the period beginning with the date he is deprived of employment and extending in each instance for a length of time determined and limited by the following schedule, but not beyond the date of termination of the bankruptcy proceedings involving either carrier:

1 yr. and less than 2 yrs.	6 months
2 yrs. " " " 3 "	12 "
3 yrs. " " " 5 "	18 "
5 yrs. " " " 10 "	36 "
10 yrs. " " " 15 "	48 "
15 yrs. and over	60 "

provided, that a dismissal allowance shall cease prior to the expiration of the prescribed period in the event of failure of the employee without good cause to return to service after being notified by the trustees of a position for which he is eligible; and provided further, that the dismissal allowance of any dismissed employee who is otherwise employed

for a limited period to dismissed employees who are unable to obtain equivalent employment, and to reimburse transferred employees for traveling and other expenses involved in moving their places

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shall be reduced to the extent that his monthly earnings in such employment and his dismissal allowance exceed the amount upon which his dismissal allowance is based. An employee shall not be regarded as a dismissed employee in case of his resignation, death, retirement on pension, dismissal for good cause, or furlough because of reduction of forces due to seasonal requirements. A dismissal allowance shall cease prior to the expiration of the prescribed period in the event of resignation, death, retirement on pension, or dismissal for good cause.

3. Any employee who is retained in the services of the carriers, or who is restored to service from the group of employees entitled to receive a dismissal allowance, who is required to change the point of his employment as a result of operation under said lease, designated as a transferred employee, and who is required, within one year from the date of commencement of operation under said lease, to move his place of residence, shall be reimbursed for expenses of moving his household and other personal effects, for the traveling expenses of himself and his immediate family, and his own actual wage loss, not to exceed two days, the exact extent of the responsibility of the carriers to be agreed upon in advance by the said carriers and the employee affected, provided, however, that changes in places of residence subsequent to the initial change caused by the operation under said lease and which result from the exercise of seniority rights shall not be considered within the foregoing provision.

4. Any transferred employee who owns his home, or an equity therein, shall be protected against any loss suffered in the sale thereof, within one year of the effective date of operation under said lease, for not less than its fair value, said fair value to be determined as of a date 30 days prior to the filing of the application in this proceeding by the

of residence, including any loss incurred through being forced to sell their homes. The District Court annulled and set aside these conditions but expressly declined to pass upon the validity of the Commission's order with the conditions annulled and set aside.

Proceedings before the Commission

Appellees are trustees in reorganization proceedings under Section 77 of the Bankruptcy Act of the Estates of The Chicago, Rock Island & Pacific Railway Company (hereinafter called "Rock Island Company") and of The Chicago, Rock Island & Gulf Railway Company (hereinafter called "Gulf Company"). On November 8, 1937, appellees, as trustees of the Gulf Company, filed with the Interstate Commerce Commission an application under

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carrier, and such fair value to be agreed upon by the carriers and each employee prior to such sale; and if any transferred employee holds an unexpired lease of a dwelling occupied by him as a home, the carriers shall protect him from loss and cost in securing cancellation of his said lease.

The carriers and the employees should be able to agree upon rules and procedure to make effective the intent of the foregoing conditions, such intent being to prevent, for the designated periods, reduction in salaries of retained employees, to provide an allowance for employees who are dismissed as a result of operation under the lease and who are unable to secure other employment, and to reimburse transferred employees for expenses and losses incurred in connection with the transfer of their place of residence made necessary because of the operation under said lease" (R. 14–16).

Section 5 (4) of the Interstate Commerce Act for authority to lease the properties of the Gulf Company to the Rock Island Company, and, as trustees of the Rock Island Company, applied for authority to enter into and accept such lease (R. 9). The Rock Island owns all of the Gulf Company's outstanding capital stock and, subject to pledge, all of its outstanding bonds (R. 9). The Gulf Company's properties, consisting of 632 miles of railway located entirely in the State of Texas, are operated separately from the 8,138 miles of railroad operated by the Rock Island (R. 9). The purpose of the lease is to combine the operations of the two carriers in order to effectuate savings in operating costs through the elimination of the accounting office now maintained by the Gulf Company at Fort Worth, Texas (R. 10).

On October 29, 1938, after full hearing and oral argument, Division 4 of the Commission issued its report (R. 8), finding that, subject to the conditions set forth above for the protection of the employees who would be affected, the lease would promote the public interest and should be approved. No order was entered pending notice to the Commission that the appellees would accept the conditions.

Subsequently the case was reargued before the entire Commission, and on April 3, 1939, the Commission issued its report affirming the report of Division 4 and directing that an order be entered

approving the lease subject to the conditions prescribed (R. 18).

The Commission found, among other things, that the proposed lease would not impose upon the public any conditions pertaining to the transportation of freight different from those now in effect, would result in no change of service to the public, and would have no effect on rates or routes (R. 10, 19). It further found that upon approval of the lease the appellees could eliminate the duplicate accounting now necessary because of the requirement of Texas law that the Gulf Company, a Texas corporation, maintain an accounting office in that State (R. 10, 19). It found that elimination of this accounting office would result in an annual saving of $100,000, to be effected through the dismissal of 49 employees and the transfer of 20 other employees to the Chicago office of the Rock Island (R. 10, 19).

The Commission affirmed the finding of Division 4 "that the duplicate accounting necessary under the present plan of operating the two properties requires excessive expenditures which are not in the public interest and which are a burden on interstate and foreign commerce" (R. 19). It further affirmed the finding of Division 4 that the welfare of the employees affected is one of the matters of public interest which the Commission must consider in proceedings under Section 5 (4) and that the conditions imposed upon its authorization of the lease are proper and relate to a subject matter within its jurisdiction (R. 23).

The Commission's ultimate finding is as follows (R. 23):

> Accordingly, we find that, subject to the conditions prescribed in the previous report herein dated October 29, 1938, the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company, of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of our plan for the consolidation of railroad properties, and will promote the public interest, and we will enter an appropriate order, effective 40 days from its date.

The order approves and authorizes the lease "upon the terms and conditions proposed and upon the conditions prescribed in the report of division 4" (R. 25).

The cost to the appellees of carrying out the conditions with respect to dismissal allowances to discharged employees would be approximately $280,758 over a period of five years, and compliance with the other conditions would cost appellees not less than $10,000 (R. 36).

Proceedings in the District Court

Appellees filed this suit in the District Court on May 24, 1939, praying that the Court set aside and annul the conditions and enjoin their enforcement

on the ground that the Commission had no statutory power to impose them and that they impair appellees' constitutional rights (R. 1–8). The answers of the United States and of the Interstate Commerce Commission deny that the conditions are unauthorized or unconstitutional and challenge the court's power to segregate the conditions from the order as a whole and to annul them without annulling the entire order (R. 26, 28).

Final hearing was held on July 12, 1939, before a statutory court of three judges. On July 31, 1939, the court filed its findings of fact, conclusions of law and opinion, holding the conditions to be unauthorized and sustaining its power to annul the conditions apart from the order as a whole (R. 37). The final decree annuls and sets aside the conditions attached to the Commission's order, permanently enjoins the appellants from enforcing them, but expressly leaves open the question of the validity of the order with the conditions deleted (R. 43).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding and deciding that the conditions referred to in, and made a part of, the order of the Interstate Commerce Commission dated October 29, 1938, and affirmed by the entire Commission on April 3, 1939, are beyond the power of the Commission to impose, and are illegal and void.

2. In holding and deciding that the plaintiffs are entitled to an order enjoining, setting aside, annul-

ling, and suspending that part of the order of the Interstate Commerce Commission which refers to and consists of the conditions, and in perpetually restraining and enjoining the defendants, their officers, agents, and attorneys, from enforcing, or attempting to enforce that part of the order.

3. In holding and deciding that it had power, under the provisions of the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220), to enjoin, annul, and set aside the conditions without enjoining, annulling, or setting aside the order in its entirety.

4. In substituting its judgment for that of the Commission upon an administrative matter, and in approving in effect the lease of one railroad by another upon terms and conditions different from those found necessary by the Commission.

SUMMARY OF ARGUMENT

I

The District Court, in ruling that the conditions imposed by the Commission were not in the public interest and were therefore invalid, misconstrued Section 5 (4) (b) of the Interstate Commerce Act. That section requires the Commission, in determining whether it should authorize acquisitions of control, to decide *first*, whether the proposal is in harmony with the Commission's general consolidation plan; *second*, whether the proposal "will promote the public interest" from the transportation stand-

point; and *third*, whether the terms and conditions of the proposal are "just and reasonable" to all parties affected thereby. It is not enough for the Commission to find that the proposal will promote the public interest; it must also find that the terms and conditions of the proposal are just and reasonable to all parties concerned.

The proposed lease which the Commission was here asked to authorize contemplated economies to be effected solely through the reduction of personnel and the transfer of employees. The vital interest of the employees in this proposal and its direct effect upon them is obvious. Under these circumstances the proposal could not be found to be just and reasonable unless it provided for the protection of those at whose expense it was to be effectuated.

There can be no substantial doubt that the conditions prescribed by the Commission to assure such protection to employees are just and reasonable. The conditions are designed to mitigate the financial injury which will be suffered by the employees if the proposal is effectuated. Furthermore, the terms of the conditions are in accord with the agreement now in effect between a number of the principal railroads and their employees as to the protection to be afforded employees when consolidations are required in the interests of economy.

However, if the Commission is restricted to imposing only such conditions as promote the public interest in transportation, we submit that the present conditions also meet that test. The purpose of

the conditions is to guard the welfare of an employee group by ameliorating the imminent financial injury contemplated by a proposed lease. Not only is such protection necessary to the maintenance of high morale among all railroad employees, but it is essential if potential labor disputes and consequent disruptions of transportation service are to be avoided.

We think no constitutional objections to the conditions can be advanced. If such objections are raised, what has been said above in regard to the reasonableness of the conditions and their relation to interstate transportation is a complete answer.

II

If it is held that the court below was correct in invalidating the conditions, we submit that the court nonetheless erred in enjoining their enforcement and leaving the remainder of the authorization outstanding. The conditions are an inextricable part of the Commission's order. If the conditions are invalid, it was the duty of the court upon so finding to remand the proceeding to the Commission for the further exercise of its judgment in accordance with the principles announced by the court. The duty of making the requisite statutory findings and granting the authorization was vested by Congress in the Commission. The courts are without authority to rewrite the Commission's findings or to authorize a lease which the Commission has not approved. *Wichita*

R. R. v. *Public Utilities Commission*, 260 U. S. 48; *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464.

ARGUMENT

I

THE CONDITIONS IMPOSED ARE A VALID EXERCISE OF THE COMMISSION'S AUTHORITY UNDER SECTION 5 (4) (B) OF THE INTERSTATE COMMERCE ACT

1. Section 5 (4) (b) authorizes the Commission to impose any conditions which are "just and reasonable" in relation to the transaction involved.

The decision of the court below is predicated upon the premise that, under Section 5 (4) (b) of the Intersfate Commerce Act, the Commission has authority to impose only such conditions as "'will promote the public interest'' from the standpoint of transportation service. Proceeding from this premise, the court concluded that the conditions here involved were unauthorized because they deal with "the private employer-employee relationship" (R. 42) rather than with "the public interest." We challenge both the premise and the conclusion.

Section 5 (4) (b) does not limit the authority of the Commission to the imposition of conditions which will promote the public interest through betterment of transportation service; to the contrary, the statute in express terms gives the Commission power to impose any conditions, germane to the transaction, which are "just and reasonable." The pertinent provision follows:

> If after such hearing the Commission finds that, *subject to such terms and conditions and such modifications as it shall find to be just and reasonable,* the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, *upon the terms and conditions and with the modifications so found to be just and reasonable.*[2] [Italics supplied.]

Analysis of this section [3] indicates that the Com-

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[2] Compare the language of this section, giving the Commission power, in authorizing acquisitions of control, to impose such conditions as it finds to be "just and reasonable," with the language of Section 1 (20) of the Act (c. 91, 41 Stat. 478, U. S. C., Title 49), giving the Commission power, in authorizing extensions or abandonments of lines, to attach such conditions "as in its judgment the public convenience and necessity may require." In considering proposals for the abandonment of lines under Section 1 (20), the Commission has construed that section as not permitting it to attach conditions requiring compensation to be paid to discharged employees. See *Chicago G. W. Ry. Co. Trackage*, 207 I. C. C. 315; *Delaware River Ferry Co. of New Jersey Abandonment*, 212 I. C. C. 580; *Quincy, O. & K. C. Ry. Co. Abandonment & Control*, 233 I. C. C. 471.

[3] The Committee reports throw no light upon the interpretation of this section. H. Rep. No. 456, 66th Cong., 1st Sess., p. 28; S. Rep. No. 304, 66th Cong., 1st Sess., pp. 19–20. And we have found nothing in the relevant parts of the Congressional debates which illuminates the intent of Congress.

mission, in determining whether it should approve or disapprove projected acquisitions of control, is required to pass upon three distinct questions: first, whether the proposal is in harmony with its consolidation plan; second, whether the proposal "will promote the public interest" from the standpoint of transportation service;[4] and third, whether the terms and conditions of the proposal, as between the parties involved and in their effect upon parties directly affected, are just and reasonable. Sharfman, *The Interstate Commerce Commission*, Vol. III–A, p. 434; *Cleveland, C. C. & St. L. Ry. Co.* v. *Jackson*, 22 F. (2d) 509 (C. C. A. 6th); *Nueces Valley Townsite Co.* v. *San Antonio U. & G. R. Co.*, 67 S. W. (2d) 215, 221 (Tex. Sup. Ct.); Simpson, *The Interstate Commerce Commission and Railroad Consolidation*, 43 Harv. L. Rev. 192, 224. The Commission is authorized to approve a projected acquisition of control only if it finds that the transaction promotes the public interest from the standpoint of transportation service *and* if it finds that the transaction is just and reasonable to all parties involved and directly affected, either upon the terms proposed by the applicant or subject to conditions imposed by the Commission.

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[4] This Court has held that the term "public interest," as used in Section 5 (4) (b), has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. *Texas* v. *United States*, 292 U. S. 522; *New York Central Securities Corp.* v. *United States*, 287 U. S. 12.

The considerations determining whether a particular transaction tends to improve transportation service may, in some circumstances, be very different from those determining whether the terms and conditions of a transaction are just and reasonable. Involved in the decision of the first question are such matters as the effect of the proposed acquisition upon competition and upon existing channels of trade, the economies which are likely to flow from the unification, and the improvement of traffic strength and of service to shippers which may result. These are all matters directly related to the public interest in adequate transportation service. But the Commission's authority clearly does not end there. Even if it finds that, from a transportation standpoint, the proposed transaction is acceptable, it must further find that the terms upon which the transaction is to be carried out are just and reasonable. This involves determination of such questions as the fairness of the consideration as between the acquiring and acquired companies, the fairness of the treatment accorded minority security holders, and the fairness of the treatment accorded other groups immediately affected, including, in our view, the employees of the acquiring and acquired companies. These are matters to be considered on their own merits, without regard to their immediate effect upon actual transportation service.

The Commission has consistently recognized the dual character of the obligations imposed upon it

by Section 5 (4) (b). Perhaps the most striking example is its decision in *Nickel Plate Unification*, 105 I. C. C. 425, which involved a proposed acquisition of control of five railroad companies by the New York, Chicago & St. Louis Railway Co. The Commission stated that the principal questions in the proceeding were two: "(1) Are the proposed acquisitions of control in the public interest and (2) are the considerations, terms, and conditions of the proposed acquisitions of control just and reasonable?" (p. 430). The first question was answered in the affirmative, the Commission stating that "from a transportation standpoint, we find that the proposed acquisitions of control are in the public interest" (p. 440). Despite this finding, the application was denied on the ground that the terms of the proposed acquisitions were unfair to minority stockholders of two of the railroads to be acquired and that voting power was unfairly distributed.[5] See also *Unification of Southwestern Lines*, 124 I. C. C. 401.

There is no rational basis for distinguishing between the interests of minority stockholders and the interests of employees insofar as either group is affected by a proposed consolidation.

[5] There is language in the Commission's report which might be construed as indicating that the Commission was also of the opinion that the conditions would promote the public interest. If the Commission did reach that conclusion, it did so only in supporting its determination that the conditions were just and reasonable.

If the Commission can protect one group, it certainly can protect the other.

The decision of the court below, construing the statute to require approval of any transaction which promotes the public interest from the transportation standpoint, irrespective of the terms upon which the transaction is to be effectuated, in effect strips the Commission of all power to protect minority interests and to assure that the acquisition is just and reasonable to all concerned. This interpretation is in conflict not only with the language of Section 5 (4) (b) but also with the whole philosophy underlying the Transportation Act of 1920. Its adoption would, we believe, lead to untold mischief in the future development of railroad unification.

The decision below is inconsistent with other decisions relating to the scope of the Commission's power to prescribe reasonable terms and conditions. In *Cleveland, C. C. & St. L. Ry. Co.* v. *Jackson*, 22 F. (2d) 509, the Circuit Court of Appeals for the Sixth Circuit stated (pp. 510–511):

> It is clear, we think, and, indeed it is not denied, that a lease like the one involved here, if approved by the stockholders of both companies and executed on behalf of those companies, could have no effect until the Commission found that the making of the lease would "be in the public interest," and until it approved, not only the terms and conditions of the lease, but the consideration

> therefor, finding that such terms, conditions and consideration were "just and reasonable in the premises." The plaintiff doubts that in determining the reasonableness of the terms the Commission has the right to consider the interest of minority stockholders, but admits that it "has assumed such jurisdiction, although never confirmed by any court decision." We think it is the duty of the Commission to protect both the public and private interests, and although it finds that the acquisition will be in the public interest, it may not approve the lease unless it further finds that the consideration, terms and conditions thereof are just and reasonable—just to the lessor, the lessee, and necessarily to the stockholders of each. The ruling in the Nickel Plate Case, 105 Interst. Com. Com'n R. 425, evidences such an interpretation of its duties by the Commission.*

Similarly, in *Nueces Valley Townsite Co.* v. *San Antonio U. & G. R. Co.*, 67 S. W. (2d) 215, the Supreme Court of Texas stated concerning this section of the Act (p. 221):

> Congress has declared that, when control over one carrier is acquired by another, it must be (1) in the public interest, and (2) that the consideration and terms and conditions of such acquisition must be just and

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* Accord: *General Investment Co.* v. *New York Central R. R.*, N. D. Ohio, Eq. No. 1180, decided October 24, 1924 (unreported); *New York Cent. Securities Co.* v. *Cleveland, C. C. & St. L. Ry. Co.*, N. D. Ohio, Eq. No 1163, decided October 24, 1924 (unreported).

reasonable to those whose private rights are affected.

The case, therefore, presents initially a very different question from that considered and decided by the court below. That issue is not whether the protection of employees adversely affected by a unification of railroad lines promotes transportation service, but whether it is "just and reasonable" in the premises.

We make no contention, of course, that the Commission's power to impose conditions upon acquisitions of control is unlimited. To the contrary, since the conditions which it imposes must obviously be germane to the transaction which it is asked to approve, its jurisdiction is necessarily of narrow scope. There are but few parties or groups whose interests are directly affected by an acquisition of control and it is only the interests of those who are directly affected which the Commission is authorized to protect.

We believe it to be beyond challenge that employees of an acquiring or acquired railroad are among those immediately concerned in the terms of acquisition. Indeed, the President of the Association of American Railroads estimated that about 75% of the savings effected by the coordination of facilities comes from a reduction in labor costs. Hearings before Committee on Interstate and Foreign Commerce on H. R. 11609, 74th Cong., 2d Sess., p. 38. Under these circumstances, we submit that no proposed acquisition of control can fairly be deemed

just and reasonable unless it provides for the protection of labor, and that the Commission's power to impose just and reasonable conditions must comprehend authority to withhold approval of a projected acquisition unless such protection is afforded.

2. The Conditions Imposed are "Just and Reasonable"

The Commission expressly found that the conditions which it imposed for the protection of employees were "just and reasonable" in the premises.[1] That finding may not be disturbed if it can be supported upon any rational basis. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286–287; *Swayne & Hoyt, Ltd.*, v. *United States*, 300 U. S. 297, 303 *et seq.*; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146.

Appellees do not attack the sufficiency of the evidence on which the Commission's findings were based and that evidence was not submitted to the court below for review. In *Mississippi Valley Barge Line Co.* v. *United States*, *supra*, this Court said (p. 286):

> The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made.

The evidence not having been submitted to the court below, the sole question for consideration is

[1] The further finding of the Commission that the conditions were "in the public interest" is discussed at pp. 32–37, *infra*.

whether the Commission's findings and conclusions were so patently arbitrary and unreasonable that there could have been no rational basis for its decision. The answer is plain.

The reports of Division 4 and of the full Commission (R. 8, 18) reveal that the primary justification for the proposed lease was an estimated saving of $100,000 a year to the railroads concerned, to be effected solely at the expense of the employees in the accounting department of the lessor company. Some of these employees were to be dismissed and others transferred. The Commission found that hardship would be imposed both on those to be dismissed and those to be transferred, and upon their families, not only through termination or reduction of their compensation, but also because the dismissals and transfers would result in at least a partial loss to the employees of their investments in property of an estimated value of $175,000, of which $44,000 was unpaid.

The Commission concluded that it was just and reasonable that the saving to the railroads to be accomplished by reduction of the pay rolls should be shared for a time with the employees at whose expense it was to be brought about (R. 22). Consequently the Commission prescribed the conditions here under review which prevent reduction of compensation of retained employees, provide partial compensation for a limited period for dismissed employees unable to obtain equivalent employment,

and provide for reimbursement to transferred employees for the cost of moving their places of residence, including any loss incurred through being forced to sell their homes. In prescribing these conditions, the Commission stated (R. 23):

> We are simply attempting in the public interest reasonably to protect those employees of the applicants who may be adversely affected economically by the grant of authority herein against unavoidable but unreasonable and unjust burdens which are not in the public interest.

The Commission has several times given expression to this view. In its report entitled *Consolidation of Railroads*, 185 I. C. C. 403, issued in 1932, the Commission stated (p. 427):

> In working out the modified plan herein approved it is expected that carriers will give careful consideration to the interests of their employees with the view of avoiding the imposition of undue hardships upon them in connection with the relocation and consolidation of shops and offices. When applications under section 5 of the act may be filed for our approval, the applicants will be expected to deal adequately with these questions and, to the extent necessary and warranted by the record, we will consider the imposition of such conditions as we may find to be proper and within our jurisdiction. If any doubt exists as to our jurisdiction in the premises it should be safeguarded by Congress.

Subsequently, in *St. Paul Bridge & Terminal Railway Co. Control,* 199 I. C. C. 588, the Commission reconsidered the whole question, again concluded that conditions designed to protect labor in proceedings under Section 5 (4) were both authorized and proper, and proceeded to impose conditions not unlike those here involved. To the same effect are the decisions of the Commission in *Louisiana & Arkansas Ry. Co. Merger,* 230 I. C. C. 156; *Louisiana & Arkansas Ry. Co. Control,* 233 I. C. C. 123; and *Louisiana & Arkansas Ry. Co. Merger,* 233 I. C. C. 37. The present case once more provided opportunity for complete reconsideration of the question, and the result was reaffirmance of the Commission's earlier conclusion.

It is significant that this conclusion is supported by the judgment of those most familiar and most directly affected by the problem. This is clearly pointed out in the concurring opinion of Commissioner Eastman, in which he states (R. 24):

> The protection of the employees for which the condition provides is substantially the same in character as the protection to which the great majority of the railroads agreed in May 1936, after prolonged negotiations with representatives of the employees, and that agreement is still outstanding. Furthermore, the so-called Committee of Six, which included three railroad executives, in their report to the President on December 23, 1938, with respect to the transportation problem, recommended that the Federal

> agency passing upon railroad consolidations "require, as a prerequisite to its approval, a fair and equitable arrangement to protect the interests of the said employees"; and I understand that the recommendations of the Committee of Six have been approved by the directors of the Association of American Railroads. * * *

The agreement of May 1936, referred to by Commissioner Eastman, was an agreement between representatives of 219 railroads and 21 railway labor organizations, providing, in the event of consolidations, for payment of dismissal compensation, expenses of transfer, and protection against loss in the sale of homes. 57 Traffic World 995 (1936). Even before this general agreement was reached its principle had been adopted by some of the leading railroad companies of the country. The Baltimore and Ohio Railroad and its employees, for example, reached an agreement whereby an amount equal to the first year's savings from trackage rights acquired over another railroad was used to pay dismissal compensation to discharged employees. 55 Traffic World 293 (1935). Similarly, the Union Pacific Railroad Company, in effecting a consolidation with four subsidiaries, reached an agreement with its employees providing for one year's full salary dismissal compensation for discharged employees, a guarantee against reduction in compensation for employees retained in new positions, payment of transportation expenses in moving, and protection of employees owning homes

against loss. 56 Traffic World 230 (1935). This recognition by the railroads themselves that employees have a vital interest in the unification of operations and that such unification should properly be accompanied by provision for the protection of discharged and transferred employees, provides, we believe, support of the most substantial character to the finding of the Commission in the present case that the prescribed conditions are "just and reasonable."

Moreover, this finding finds equally strong support in the declared legislative policy of Congress. Section 7 (b) of the Emergency Railroad Transportation Act of 1933 (48 Stat. 214, U. S. C., Title 49, Sec. 257 (Supp. 1938)), provided that the number of employees in the service of a carrier should not be reduced, nor should any employee be placed in a worse position with respect to compensation, by reason of any action taken under the Act, including the approval of consolidations. Although the provisions of the Act were of only temporary duration, expiring on June 17, 1936, they clearly indicate Congressional recognition of the reasonableness and justice of protecting railway labor against the hardship inherent in the displacement and transfer of employees through the unification of operations.[8]

[8] The provisions of Section 7 (b) of the Emergency Railroad Transportation Act of 1933 was in general modeled on action taken in Great Britain in 1921 when the consolidation of the British railways into four systems was required. The Act providing for this consolidation contained provision for

Even more direct recognition of the necessity for this policy was given by Congress at its last regular session. In order to assure that it had the necessary statutory power, the Commission, in its reports to Congress for the years 1935 and 1936, recommended enactment of "further statutory provisions to protect employees from undue financial loss as a consequence of authorized railway abandonments or unifications." 49th Annual Report of the Interstate Commerce Commission, pp. 37–38, 97; 50th Annual Report of the Interstate Commerce Commission, p. 107.* Pursuant to this recommenda-

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reimbursement of employees for loss from displacement or reduction in compensation. See House Doc. No. 394, 74th Cong., 2d Sess., pp. 51–52.

*In its 49th Annual Report the Interstate Commerce Commission stated (pp. 37–38):

"It follows as a consequence of such abandonments or unifications that sometimes employees are transferred from one location to another and in some cases are dismissed from the service. * * * In individual cases the financial sacrifices involved are calamitous. In some cases the carriers concerned have voluntarily effected arrangements satisfactory to the employees; in others we were able to impose protective provisions in our orders; but in still others we lacked the statutory authority to impose conditions which just treatment of employees appeared to require. *This refers particularly to relocation or abandonment of shops.* We recommend *further* statutory provisions to protect employees from undue financial loss as a consequence of authorized railway abandonments or unifications found to be in the interest of the general public, or otherwise lawfully effected." [Italics supplied.]

It is apparent from this statement that the Commission's doubt with respect to its statutory power to impose conditions for the protection of labor primarily concerned its

tion, both the Senate and the House of Representatives, during the first session of the 76th Congress, passed general railroad bills, now in conference, containing the following provision (S. 2009 and House substitute for S. 2009):

> The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected.

We do not believe that passage of these bills by the Senate and House is any indication that Congress interpreted the present Act as not authorizing the Commission to impose conditions to protect labor.[10] The passage of the bills is more logi-

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power to impose such conditions under Section 1 (20) of the Act relating to abandonments. As previously pointed out (see note 2, *supra* p. 17), the Commission has ruled that under the provisions of Section 1 (20) it has no power to impose conditions to protect labor while, under the provisions of Section 5 (4) here involved, its consistent ruling has been that it has such power (see pp. 26–27, *supra*).

The 50th Annual Report of the Commission merely incorporated by reference the recommendation for enactment of "further statutory provisions to protect employees" (p. 107).

[10] The committee reports with respect to this matter are not conclusive. The Report of the Senate Committee on Interstate Commerce (S. Rep. No. 433, 76th Cong., 1st Sess., p. 29) states with reference to this section: "The provisions referred to immediately above were included pursuant to the recommendations of the Report of the Committee of Six (p. 30). There are no similar provisions in existing law." The statement that there are no similar provisions

cally to be regarded as intended simply to remove all possible doubt that the Commission has this power and to direct that the power should be exercised in every case. Cf. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177. In our view, this direction in the proposed legislation that in every proceeding the interests of employees must be protected is convincing proof that the granting of such protection in the present case was just and reasonable and, consequently, was within the statutory authority of the Commission.

3. The Conditions Imposed are in the Public Interest

If we are wrong in our construction of Section 5 (4) (b) as authorizing the Commission to impose just and reasonable conditions, irrespective of the immediate effect of such conditions upon the public interest in transportation service, the case, on the

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in existing law is not inconsistent with the view that Section 5 (4) gives the Commission authority to prescribe such conditions as are here involved. The proposed bill provides that in every case the Commission shall require as a prerequisite to its approval that there be a fair and equitable arrangement to protect the interests of employees. There is no express provision to this effect in existing law, and, although we believe that Section 5 (4) must be construed to *authorize* the Commission to impose such conditions when it believes such action warranted, the section, as it now stands, does not *require* the Commission to do so in every case. The provisions of the proposed legislation are, therefore, obviously different from the law presently existing.

The Report of the House Committee on Interstate and Foreign Commerce (H. Rep. No. 1217, 76th Cong., 1st Sess.) throws no light whatever on the question (p. 12).

merits, is narrowed to the question considered by the court below, *i. e.*, whether the conditions under review are germane to the maintenance of an adequate and efficient railroad system. This, like the question of whether the conditions are "just and reasonable", involves an issue of administrative fact, the determination of which Congress has delegated to the Commission.

In the present case, the Commission has determined that the conditions prescribed are not only just and reasonable but also that they "will promote the public interest" (R. 23). As stated above, this determination may not be disturbed unless it is without any rational basis. *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286–287; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 303 *et seq.*; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146. That there is a rational basis for the holding we believe to be evident from the Commission's findings and report and from the established determination of Congress that there is a direct relationship between the welfare of railroad employees and the maintenance of an efficient transportation system.

Enactments of Congress directed primarily to the welfare of railway employees are numerous. The hours of service of such employees have been limited (*Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612), and, dur-

ing an emergency, their wages have been fixed. *Wilson* v. *New*, 243 U. S. 332. Safety appliance measures designed primarily or exclusively to assure the safety of railway employees have been enacted. See *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33. And steps have been taken to assure the maintenance of harmonious labor relations, culminating in the passage of the Railway Labor Act in 1926 and in its amendment in 1934 (44 Stat. 577, 48 Stat. 1185, U. S. C., Title 45, §§ 151–163). *Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548; *Virginian Ry.* v. *Federation*, 300 U. S. 515. Congress has also enacted retirement and pension legislation—the Railroad Retirement Acts of 1934, 1935, and 1937 (48 Stat. 1283, 49 Stat. 967, 50 Stat. 307, U. S. C., Title 45, §§ 201–214, 228 (a)–(r)). Although the 1934 Act was invalidated by this Court in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, the general legislative policy which it embodied has been accomplished in the 1935 and 1937 Acts, enacted primarily under the taxing and spending powers of Congress. The enactment of these statutes clearly indicates what Congress conceives to be necessary or advisable to promote the adequacy and efficiency of the transportation system.

We believe that, in the light of this legislative history, the fundamental proposition that the wel-

fare and morale of railroad employees is vitally connected with the "public interest" in transportation service cannot be successfully challenged. Only the narrow issue remains, therefore, as to whether the conditions prescribed are reasonably related to the maintenance of such welfare and morale.

The facts already recited clearly indicate that the Commission's affirmative determination of this issue has substantial support. The Commission, by Section 5 (2) of the Act, is under a Congressional mandate to "prepare and adopt a plan for the consolidation of the railway properties * * * into a limited number of systems" as soon as practicable. The unification thus directed will result in tremendous savings in operating cost, but, it has been estimated, 75% of these savings will be at the expense of labor (see page 23, *supra*). This means that, unless the Commission is authorized to impose conditions to protect labor from the burden of consolidations which it approves, the employees of all railways will be under a constant threat of sudden loss of employment, with a consequent disrupting effect upon their morale. Clearly the maintenance of a high morale among railroad employees is as necessary to the efficiency of the transportation system as is the elimination of unnecessary operating costs. See *Associated Railways Company Acquisition*, 228 I. C. C. 277, 368.

Moreover, any device designed to obtain economy at the expense of labor contains the seeds of potential dispute. The history of the labor movement is replete with instances of strikes and violence resulting from the resistance of labor to the effectuation of economies through the elimination of employees. If the Commission has no power to protect the interests of labor when authorizing consolidations, it may be faced with the alternative of either carrying out the mandate of Congress and leaving labor to protect itself, or refusing to grant any authorization which will adversely affect employees. The result of either course would be to retard the development of an adequate and efficient transportation system.

These are not fancied difficulties but actualities recognized by all who have dealt with the problem. The Federal Coordinator of Transportation, in his Fourth Report transmitted to Congress, recommended the enactment of a comprehensive system of dismissal compensation, stating that he believed it could be shown that such a system "would enhance the safety or efficiency of railroad service" (H. Doc. No. 394, 74th Cong., 2d Sess., p. 56). As previously pointed out, the railroads themselves recognized the validity of this conclusion when, in May 1936, representatives of 219 lines and 21 labor organizations agreed to a system for the protection of labor in the event of consolidations (see p. 28, *supra*). It can scarcely be argued that a matter so vitally concerning the relationship between the

railroads and their employees as to call for a general agreement between all the major lines and all the major railway labor organizations has no bearing upon the public interest in transportation service. Cf. *Virginian Ry.* v. *Federation*, 300 U. S. 515, 552. Indeed, the argument would seem foreclosed by the fact that Congress, in enacting the Emergency Transportation Act of 1933 and in passing general railroad bills during the last regular session, made provision for the protection of labor in the type of situation here presented, thus clearly expressing its view as to the direct relationship between railroad transportation and the protection of those whose labor makes such transportation possible (see pp. 29–31, *supra*).

Under these circumstances, we submit that there is clearly a "rational basis" in fact for the Commission's conclusion in the present case that the conditions prescribed were necessary to protect the public interest in the suitable maintenance of an efficient transportation system.

4. The Conditions Imposed Do Not Impair the Constitutional Rights of the Appellees

The considerations advanced in the preceding sections of this brief dispose, we believe, of the constitutional arguments advanced by appellees. Since the conditions prescribed have a direct relationship to the suitable maintenance of transportation service, their imposition is clearly within the commerce power of Congress. And no viola-

tion of due process is involved since, as we have shown, the conditions are clearly just and reasonable.

No constitutional objection could be raised even should this Court hold that the conditions do not directly promote the public interest in transportation service and come within the statutory authority of the Commission only because of its power to impose "just and reasonable" conditions. The purpose of the conditions, as we have pointed out, is to assure that an interstate transaction, authorized by the Commission, will be effectuated on fair and equitable terms to all concerned. Clearly it is within the competence of Congress to prescribe a rule that will prevent an interstate transaction, admittedly subject to federal control, from working harm to those immediately affected by its consummation. Cf. *Mulford* v. *Smith*, 307 U. S. 38, 48. As this Court stated in the *Second Employers' Liability Cases*, 223 U. S. 1, 47,

> To regulate in the sense intended is to foster, protect, control, and restrain, *with appropriate regard for the welfare of those who are immediately concerned* and of the public at large.

The conditions here imposed come well within the broad limits of this rule.

It is true that in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, this Court, by a narrow majority, held that a compulsory pension system for railroad employees was not within the commerce power of Congress. The decision of the

majority of the Court, however, was necessarily predicated upon the finding that the pension system there involved was not related to the suitable maintenance of transportation service. Here, on the other hand, as we have pointed out, such a relationship does in fact exist and the case therefore falls within the facts of the *Alton* case as viewed in the dissenting opinion of the Chief Justice rather than as viewed in the majority opinion of the Court.

II

EVEN IF THE CONDITIONS ARE INVALID, THE COURT BELOW ERRED IN ENJOINING THEIR ENFORCEMENT AND LEAVING THE REMAINDER OF THE AUTHORIZATION OUTSTANDING. THE PROPER RELIEF WOULD HAVE BEEN TO SET ASIDE THE ENTIRE AUTHORIZATION AND REMAND THE WHOLE PROCEEDING TO THE COMMISSION

The theory upon which appellees sought review of the Commission's action was that the District Court had the power to strike down the conditions upon which the authorization was granted and leave the authorization outstanding and valid. The United States and the Commission, by their several answers to the bill of complaint, raised the issue of the court's authority to grant such relief (R. 27, 30). The matter was fully argued at the hearing and the court apparently concluded that, since it had jurisdiction under the Urgent Deficiencies Act to enjoin, annul, set aside, or suspend, in whole or in part, any order of the Commission, it had power to grant the relief prayed (R. 42–43). Consequently, upon finding that the conditions imposed were invalid, the court entered a decree setting

aside the conditions and enjoining appellants from attempting to enforce them (R. 43–44). Although the decree expressly leaves open the question of the validity of the order without the conditions, the obvious intention of the court below was to allow appellees to consummate the lease without complying with the conditions and without securing further authorization from the Commission. Since the conditions are attached to a *permissive* order, the only purpose which the injunction against enforcement of the conditions can possibly serve is to allow appellees to avail themselves of the permission without complying with conditions.

We think that the court below erred in confusing the question of its jurisdiction under the Urgent Deficiencies Act with the question of what relief should be granted. We do not contend that the court had no power to entertain the suit; our contention is rather that it erred in the type of relief which it granted, *i. e.*, in entering a decree which purports to leave outstanding and valid an authorization which was not granted by the Commission and which is no longer supported by the requisite statutory findings of the Commission. In our view, the court should have remanded the whole proceeding to the Commission for the performance of the administrative function in a manner not inconsistent with the judgment of the court as to the validity of the conditions.

By section 5 (4) (b) of the Act the Commission, as a condition precedent to granting any authori-

zation, must find that "subject to such terms and conditions * * * as it shall find to be just and reasonable" the proposal "will promote the public interest." The statute is unequivocal—unless such a finding is made *by the Commission*, no consolidation or lease can be authorized or effected.

In the present case the Commission stated its ultimate finding in the following terms (R. 23):

> Accordingly, we find that, subject to the conditions prescribed in the previous report herein dated October 29, 1938, the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company, of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of our plan for the consolidation of railroad properties, and will promote the public interest, and we will enter an appropriate order, effective 40 days from its date.

It is entirely clear from this language that the conditions prescribed are an inextricable part of the finding which the statute required the Commission to make before it could approve the lease. The Commission has made no finding with respect to the lease shorn of the conditions and, until it does make such a finding, it has no authority under the statute to approve the lease. The rule is set-

tled that in the absence of basic findings, no order of an administrative tribunal can be sustained. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 431–433; *Florida* v. *United States*, 282 U. S. 194, 215; *Mahler* v. *Eby*, 264 U. S. 32, 43–45; *Wichita R. R.* v. *Public Utilities Commission*, 260 U. S. 48, 59. See also dissenting opinion in *United States* v. *Chicago, etc., R. Co.*, 282 U. S. 311, 342–344. In violation of this rule, the decision below leaves in effect an order which the Commission not only did not enter but which, in the absence of the statutory finding, it was without authority to enter.

Appellees may contend, and the court below apparently believed, that the evidentiary recitations in the Commission's report so clearly indicate the conclusion which the Commission would reach that it was unnecessary to remand the case to the Commission for further action. There are two fundamental objections to this position: *first*, it is impossible to predict with certainty what ultimate conclusion the Commission would in fact reach upon a reconsideration of the case within the limits of its authority as defined by the court below; and *second*, the courts have no power to substitute their judgment for that of the Commission, to supply necessary findings which the Commission has omitted to make or to rewrite the Commission's findings so as substantially to change their character. This second proposition is true no matter how plain the facts or how overwhelming the weight of the evidence.

In *Wichita R. R.* v. *Public Utilities Commission*, 260 U. S. 48, this Court said (p. 59):

> *When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.*
>
> It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We can not agree to this. It is doubtful whether the facts averred in the petition were sufficient to justify a finding that the contract rates were unreasonably low; but we do not find it necessary to answer this question. *We rest our decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statutes of the State.* [Italics supplied.]

Again in *Florida* v. *United States*, 282 U. S. 194, this Court pointed out (p. 215):

> The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (*The Beaumont, Sour Lake & Western Railway Company* v. *United States, ante*, p. 74), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the

evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported.

If this Court concludes that the Commission acted on erroneous principles of law and consequently that the findings which it made cannot be sustained, the way is open to remedy the situation and protect all parties by remanding the case to the Commission. The court's decision will then "be a final and indisputable basis of action as between the Commission and the defendant [appellees]." *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 38; see *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 143. But until, upon remand, the Commission does make the requisite statutory finding with respect to the lease without the conditions, the appellees have no authority to consummate the transaction.

Not only did the court below err in leaving in effect an order not supported by the requisite statutory finding, but it also erred in leaving in effect an order which the Commission never made and which is substantially different in character from the order which the Commission did make. The change in the order was not made by the Commission but by the court below, which has assumed the power to rewrite and revise the provisions of the order. In so doing, the court has attempted to

exercise an administrative function delegated by Congress to an administrative tribunal. It is fundamental that the courts do not have this power. *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266; *Piedmont & Northern Ry.* v. *United States*, 280 U. S. 469; *United States* v. *Louisville & Nashville R. R.*, 235 U. S. 314; *Procter & Gamble* v. *United States*, 225 U. S. 282; *cf. Rochester Telephone Corporation* v. *United States*, 307 U. S. 125. In *United States, ex rel. Chicago etc. R. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, this Court said (p. 60):

> Where judgment or discretion is reposed in an administrative agency and has by that agency been exercised, courts are powerless by the use of the writ [of mandamus] to compel a different conclusion. *Interstate Commerce Comm'n* v. *United States ex rel. Waste Merchants Ass'n*, 260 U. S. 32; *Interstate Commerce Comm'n* v. *United States*, 289 U. S. 385, 394. Compare *Wilbur* v. *United States*, 281 U. S. 206, 218.

In *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, 469, it was said that the courts cannot "exercise or participate in the exercise of functions which are essentially legislative or administrative."

If the action of the court below is to be construed as granting appellees permission to carry out the proposed plan in a manner different from that authorized by the Commission, the court has usurped

the administrative function vested by Congress solely in the Commission. It is immaterial that the Commission may have invalidly prescribed the terms and conditions which it imposed upon the plan. The fact remains that the sole tribunal empowered to grant the necessary authority has granted it only subject to such terms and conditions.

Arguments may be advanced as to the separability of the conditions from the remainder of the Commission's order. That raises the question of what the Commission intended and the Commission, which is a party to this suit, denies that it intended the conditions to be separable. As a matter of fact, it is perfectly clear from the reports that when the Commission granted authority it did so with intent to authorize nothing except the entire scheme encompassed by its order. What it might have done if it had known that part of the scheme could not be enforced remains in the realm of speculation.

In this respect, the statement of this Court in *United States* v. *Louisville & Nashville R. R.*, 235 U. S. 314, is peculiarly pertinent (p. 320):

> In view of the doctrine announced in *Interstate Com. Com.* v. *Illinois Cent. R. R.*, 215 U. S. 452; *Interstate Com. Com.* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Interstate Com. Com.* v. *Louisville & Nashville R. R.*, 227 U. S. 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a

right to do so, obviously exerted an authority not conferred upon it by the statute.

Appellees will no doubt urge that the arguments advanced above are answered by the opinion of this Court in *United States* v. *Chicago, etc., R. Co.*, 282 U. S. 311. We do not regard that decision as necessarily conflicting with our position in the case at bar. In the first place, the majority of the court dealt only with the question of the lower court's jurisdiction to entertain the suit and did not discuss the question of what relief should be granted. In the present case we are not urging that the court below lacked jurisdiction of the suit, but rather that it granted relief which it had no power to grant. In the second place, analysis of the majority opinion indicates that it is based primarily on the view that the subject matter of the condition had no relation whatever to the subject matter of the proposal for which authority was sought and that the Commission had dealt with the condition "as an independent and separate matter" (p. 330). Consequently, the majority regarded the condition as being a separable and collateral part of the order which was not germane to the remaining parts. On the other hand, the minority of the court were of the opinion that the entire order was a unity and that the Commission intended it to be considered as such. Here there is no question but that the subject matter of the conditions is intimately related to the subject matter of the lease and that the conditions are an inextricable part of the scheme which the Commission authorized. That was the Commis-

sion's understanding, and the Commission in authorizing the scheme intended the conditions to be inseparable. To rule that the conditions may be separated is to disregard the intent of the Commission as shown by the record and as stated in court. The Commission's announcement of its own state of mind should be conclusive.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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